IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

THURSDAY, THE 18TH OCTOBER 2007 / 26TH ASWINA 1929

RFA.No. 75 of 2004(B)

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OS.171/1992 of SUB COURT,THODUPUZHA

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APPELLANT/PLAINTIFF:

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HASAN KHANI RAWTHER, S/O. LATE
MEERALAVA RAWTHER, AGED 52, VANIYAPURAYIL HOUSE,
PETTANADU KARA, THODUPUZHA VILLAGE, THODUPUZHA
TALUK, (REP. BY THE NEXT FRIEND SAIJO HASSAN,
S/O. HASSAN KHANI RAWTHER, VANIYAPURAYIL,
PETTANADU KARA, THODUPUZHA VILLAGE & TALUK.)

BY ADV. S.V.BALAKRISHNA IYER (SR.)
SRI.R.T.PRADEEP
SRI.NAGARAJ NARAYANAN
SRI.V.VIJULAL
SRI.T.A.PRASANTH
SRI.NAIR AJAY KRISHNAN
SRI.C.V.BIMAL ROY
SRI.K.JAYAKUMAR

RESPONDENTS: DEFENDANTS 1 TO 6 AND ADDL.DEFENDANTS 7 TO 13:

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1. MUHAMMED RAWTHER, S/O. MEERALAVA RAWTHER
AGED 61 YEARS, VANIYAPURAYIL HOUSE,
PETTANADU KARA, THODUPUZHA VILLAGE & TALUK (DIED).

2. SYED MUHAMMED RAWTHER, S/O. MEERALAVE
RAWTHER, AGED 53 YEARS, PETTANADU KARA,
NEYYASSERY VILLAGE, THODPUZHA TALUK.

3. SHEHAMMAL, AGED 59 YEARS,
W/O. IBRAHIM HASSAN, NELLIKUNNEL,
VANNAPPURAM VILLAGE, VANNAPURAM KARA,
THODUPUZHA TALUK.

4. AMINA, W/O. PAREETH, AGED 47 YEARS
THEKKEPURAYIDATHIL, KARIKODE KARA,
KARIKODE VILLAGE, THODUPUZHA.

5. PATHUMMAL, W/O. SYED MUHAMMED,
AGED 65 YEARS, ILAMTHURUTHIL HOUSE,
PATHINARAMKANDOM KARA, VATHIKUDI VILLAGE,
UDUMBANCHOLA TALUK.

6. HASSANKHAN, S/O. MEERANKHAN,
AGED 56 YEARS, THOPPIL PUTHEN VEETTIL,
PURAMPILLICHIRA KARA, KUMARAMANGALAM VILLAGE
THODUPUZHA TALUK.

7. KHADEEJA, W/O MUHAMMED RAWTHER,
VANIYAPURAYIL VEEDU, PETTANADU KARA,
THODUPUZHA VILLAGE.

8. SHAHUL, S/O. MUHAMMED RAWTHER, DO. DO.

9. RASHEED, S/O. MUHAMMED RAWTHER, DO. DO.

10. ZAKKIR, S/O. MUHAMMED RAWTHER,
DO. DO.

11. SHEKKEELA, D/O. MUHAMMED RAWTHER, DO. DO

12. SABU, D/O. MUHAMMED RAWTHER, DO. DO.

13. THAHIRA, D/O. MUHAMMED RAWTHER, DO. DO.

R3 BY ADV. SRI.MATHEW JOHN (K)
R6 BY ADV.SRI.GEORGE ABRAHAM
SRI.SUJESH MENON V.B.
SRI.SIRAJ KAROLY
SRI.SUDHEESH.A.
R7 & R9 TO R13 BY ADV. SHRI K.K.CHANDRAN PILLAI

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 18/10/2007, ALONG WITH RFA NO. 491 OF 2006 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

*"C.R."*

**K. PADMANABHAN NAIR ,J.**

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**R.F.A.Nos.75 of 2004**
**&**
**491 of 2006**

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**Dated, this the 18th day of October, 2007**
**JUDGMENT**

These two appeals are filed against a common judgment and decrees passed in O.S.Nos.171/1992 and 169/1994 on the file of the Subordinate Judge's Court, Thodupuzha. R.F.A.No.75/2004 arises from the judgment and decree passed in O.S.No.171/1992 and R.F.A.No.491/2006 arises from the judgment and decree passed in O.S.No.169/1994 (Originally filed as O.S.No.126/1992 before the Munsiff Court, Thodupuzha which was subsequently transferred to Sub Court, Thodupuzha and re-numbered as O.S.No.169/1994). R.F.A.No.491/2006 was originally filed as A.S.No.24/2004 before the District Court, Thodupuzha and subsequently the same was withdrawn to this Court and re-numbered as R.F.A.No.491/2006 to be heard along with R.F.A.No.75/2004.

**R.F.A.No.75/2004**

This appeal is filed by the plaintiff in O.S.No.171/1992. Suit was for declaration of title and possession and for a decree of permanent prohibitory injunction. The following are the material averments in the plaint. Plaintiff and defendants 1 to 5 are the children of late Shri Meeralava Rawther of Vaniyapurayil. 6th defendant is the son of the half-sister of the Meeralava

Rawther. Partition was effected in the family of Meeralava Rawther in the year 1953. Plaint A schedule properties having an extent of 3 acres and 21 cents were allotted to Meeralava Rawther. Those properties were comprised in Sy.Nos.133/1A and 133/1B of Thodupuzha Village. From that property one acre and 26 cents was given to the mother of the 6th defendant; 25 cents of property was sold by Meeralava Rawther in the year 1981 and the balance orally gifted to the plaintiff by his father during January, 1982. The plaintiff was in absolute possession and enjoyment of A and B schedule properties from the date of oral gift. 1st defendant was the eldest son of Meeralava Rawther. He married in the year 1960. Meeralava Rawther gave 25 cents of property to 1st defendant Mohammed Rawther as per document No.1163/1965. That was in addition to one acre of property given to him by the father at the time of marriage. One acre and 25 cents of property was given to the 1st defendant as the share in the family properties due to him. After receipt of the same 1st defendant executed document No.1163/1965 relinquishing his rights over the remaining properties of Meeralava Rawther. The properties conveyed to him under document No.1163/1965 was accepted subject to such a condition. He sold away the property given to him by his father and was residing elsewhere. 2nd defendant is the second son of Meeralava Rawther. He married 26 years prior to the date of filing of the suit. In the year 1971 Meeralava Rawther gave enough money to 2nd defendant and taking that amount as his share in the family properties 2nd defendant had shifted his

residence to Neyyasseri. He had executed document No.866/1971 in favour of Meeralava Rawther relinquishing his rights over the remaining properties. 3rd defendant is the second daughter of Meeralava Rawther. She is married and settled at Vannappuram. In the year 1971 she was also given funds which was sufficient to cover the legitimate share due to her from the family properties. After receiving the same she executed a document No.1097/1971 in favour of her father relinquishing her rights over the remaining properties. 4th defendant is the youngest daughter of Meeralava Rawther. She is also married and settled elsewhere. She was also given necessary funds which will be normally due to her as her share in the properties of Meeralava Rawther and on receipt of the amount she released her rights over the remaining properties under release deed No.648/1981. For settling the share of the 4th defendant Meeralava Rawther sold 25 cents of property to one Raman of Vaniyapurayil. 5th defendant is the eldest among the daughters of Meeralava Rawther. She was given away in marriage 42 years prior to the filing of the suit. She was also given enough funds which was be equivalent to her share in properties of father. She had executed document No.1095/1971 in favour of Meeralava Rawther releasing her right over the remaining properties. Meeralava Rawther had given sufficient properties and amounts to his three daughters in accordance with the custom then prevailing and also as per his capacity. The amounts referred to in the above stated documents were the amounts given to them in addition to such payments. According to the

plaintiff, all other children of Meeralava Rawther were given their due share by Meeralava Rawther during his life time itself and no such property was given to him. Plaintiff's marriage took place in the year 1971 and even before that date his brothers and sisters were residing separately after receiving their share from the family properties. From 1971 onwards the plaintiff and parents alone were residing in the family house and that was with the intention to give A and B schedule properties exclusively to the plaintiff. Because of the decision to give these properties exclusively to the plaintiff father gave necessary shares due to other children before the end of 1971. Meeralava Rawther had sold away his properties at Udumbannur to pay the necessary amounts to defendants 2, 3 and 5 and sold 25 cents of property which he intended to give to the plaintiff to pay off the amounts to the 4th defendant. From 1971 onwards the parents are being looked after by the plaintiff alone. 1st defendant sold away the entire properties given to him by his father. Thereafter father with the permission of the plaintiff permitted 1st defendant to put up a structure on the north-western corner of the entire property and from the year 1974 onwards he is residing there. According to the plaintiff the area of property will come to 2 ½ cents and that is scheduled as B schedule property. In the year 1981 father decided to gift the suit properties to the plaintiff and accordingly he called other children to the family house in January, 1982 and in their presence he openly declared that A and B schedule properties were given to the plaintiff as gift and from January, 1982 onwards

plaintiff is in enjoyment of the property as the property gifted to him by his father. Father died in the year 1986. 6th defendant who was in enimical terms towards the plaintiff instigated the other children of Meeralava Rawther and at his instigation 2nd defendant had executed a sale deed in favour of 6th defendant claiming that he is a co-owner of the suit property. That document was not supported by any consideration and on the strength of that document 6th defendant tried to trespass into the property. That document is not binding on the plaintiff. Hence the suit for declaration of title and possession of plaintiff over A and B schedule properties and also for a decree of permanent prohibitory injunction.

2. Defendants 1 and 2 did not file any written statement. 3rd defendant filed a written statement contending that Meeralava Rawther died intestate leaving the plaint schedule properties for inheritance by defendants 1 to 5. The plaintiff and defendants 1 to 5 are co-owners in joint possession of the properties. 6th defendant purchased the share of defendants 2 and 5 under two sale deeds. 1st defendant died pending suit leaving his widow and children and they are also in joint possession of the properties along with the defendants. Late Meeralava Rawther and his legal heirs are hanafi muslims governed by hanafi law of inheritance. The averment that Meeralava Rawther orally gifted the properties to plaintiff in the month of January, 1982 was denied. He was entitled to get only 2/9 share in the properties . It was also contended that the allegations in paragraph 3 to 10 in the plaint were not true and correct. Defendants 1 to 5 were not sharers of

the immovable properties owned by the deceased during his life time and the release deeds were of no use or effect. The properties given to them during the life time of Meeralava Rawther became their absolute properties and those transfers did not disqualify them from inheriting the properties on the death of their father. The deceased was the absolute owner and the person in possession of the plaint schedule properties till his death. The oral gift alleged by the plaintiff was denied. There was no such oral gift and it never took effect. During the life time of deceased he allowed the 1st defendant to put up a building in the properties having an area of 1.70 acres and his heirs are residing permanently in the house. Plaintiff and heirs of 1st defendant are taking the income for and on behalf of other legal heirs of the deceased. Till the death of 1st defendant he was taking income along with plaintiff. They were bound to account income received by them and to pay the respective share due to the other sharers. The averment that the 1st defendant put up building with the consent of plaintiff was denied. The deceased alone was the title holder of the properties and therefore, consent of the plaintiff was not required. The averment that Meeralava Rawther made a declaration in the presence of other children was denied. The affairs of Meeralava Rawther were attended by all of his sons and daughters. Plaintiff had no special role in the matter. If Meeralava Rawther had any intention to gift his properties to the plaintiff he would have executed a gift deed for which he had ample time. The 6th defendant had purchased 2/9 share of the 2nd defendant and 1/9 share of the 5th

defendant in the properties for valid consideration. The allegations levelled against 6th defendant were denied. The averment that the 6th defendant induced the other defendants to commit trespass upon the plaint schedule properties was untrue and hence denied. It was contended that the 3rd defendant had filed O.S.No.126/1992 before the Munsiff Court, Thodupuzha for partition of her 1/9 share of the suit properties.

3. 6th defendant filed separate written statement raising contentions which are identical to those raised by the 3rd defendant in his written statement. The averments that Meeralava Rawther orally gifted the suit properties to the plaintiff and the independent possession claimed by the plaintiff were denied. Till the death of Meeralava Rawther he was the absolute owner of the properties and it was in his absolute possession and enjoyment. It was contended that Meeralava Rawther died intestate leaving his properties for inheritance by his legal heirs. When Meeralava Rawther died plaintiff and defendants 1 to 5 inherited the properties and they became the co-owners in joint possession of it. On 7.3.1992 6th defendant purchased 2/9 share of the 2nd defendant as per sale deed No.687/1992 and on 6.5.1992 he purchased the 1/9 share of the 5th defendant as per sale deed No.1294/1992. By virtue of the above sale deeds the 6th defendant stepped into their shoes. 1st defendant died pending suit leaving his widow and children to inherit his share in the plaint schedule properties. Plaintiff and defendants 1 to 5 are muslims governed by hanafi law of inheritance. 6th

defendant was entitled to get 3/9 share in the plaint schedule properties whereas the plaintiff was entitled to get 2/9 share only. There was no gift as alleged in the plaint. The allegations contained in paragraphs 3 to 10 in the plaint were false and incorrect. During the life time of Meeralava Rawther none of the defendants had share or interest in his properties and the properties were held by him as absolute owner and, therefore, the alleged release deeds have no legal effect or legal consequences. Those documents will not affect their future right to succeed to the property left by their father. If Meeralava Rawther had given any properties to defendants 1 to 5 during his life time such acts do not disqualify them from inheriting the properties on his death. The allegation that Meeralava Rawther intended to give the plaint schedule properties to the plaintiff was false and incorrect. Meeralava Rawther never intended to give the property to the plaintiff alone. Plaintiff was a Government employee and hence Meeralava Rawther gave additional help to other children. The averments in paragraph 11 of the plaint are false and incorrect. The deceased allowed the 1st defendant to put up a house in the north-western portion of the properties. He also allowed the 1st defendant to use about 40 cents property surrounding the house for his own purpose. He was in possession of said portion till his death and after his death his wife and children are in occupation of the same. The averment that Meeralava Rawther permitted the 1st defendant to put up a building with the consent of the plaintiff was denied. Plaintiff's consent was never asked for. Plaintiff did not get right over the property

till the death of his father. The averments in paragraph 12 of the plaint were denied. Meeralava Rawther never intended to gift his properties to the plaintiff and there was no declaration of gift by him. There was no acceptance of gift by the plaintiff and the other heirs of the deceased never consented to it. The Plaintiff never became the absolute owner of the properties. The affairs of Meeralava Rawther were looked after by all his children and the plaintiff had no special role. Till his death he was healthy and capable to execute a gift deed. 6th defendant had no enmity towards the plaintiff. The averment that the the 6th defendant induced the other defendants to trespass upon the plaint schedule properties was not true and hence denied. Plaintiff was having only 2/9 share in the properties. The 6th defendant had purchased 2/9 share of the 2nd defendant by paying Rs.15,000/-. On 20.3.1992 the 6th defendant demanded partition of the plaint schedule properties and separate possession of his share by sending lawyer notice. The said notice was served on the plaintiff on 25.3.1992. On 6.5.1992 6th defendant purchased 1/9 share of the 5th defendant as per sale deed No.1294/1992 for a consideration of Rs.8,000/-. He is in joint possession of the properties along with plaintiff and defendants 1 to 5 from the date of sale deeds. It was contended that the 3rd defendant had filed a suit as O.S.No.126/1992 before the Munsiff Court, Thodupuzha and the 6th defendant had filed a statement claiming partition and separate possession of 3/9 share.

4. Subsequent to the death of 1st defendant his heirs were impleaded as

additional defendants 7 to 13. They filed a written statement raising the following contentions. The averments that deceased Meeralava Rawther orally gifted the plaint schedule properties to the plaintiff in January, 1982 and he became the absolute owner were denied. Plaintiff never got independent possession over the plaint schedule properties and till the death of Meeralava Rawther he was in absolute possession. He died intestate and plaintiff and defendants 1 to 5 inherited the properties. They became the co-owners in joint possession of the properties. Later the 6th defendant purchased the share of defendants 2 and 5 and since the date of such purchases the 6th defendant became a co-owner and is in joint possession of the properties along with others. The 3rd defendant had filed a suit for partition and the same was pending. The averments in paragraphs 3 to 10 are false and incorrect and hence denied. During the life time of Meeralava Rawther his children had no share or interest in his properties. The properties were held by him as absolute owner. The alleged release deeds have no legal effect or legal consequences. They would not affect their future right to succeed to the property left by their father on his death. Even if some properties were given to defendants 1 to 5 by their father during his life time that do not disqualify them from inheriting the properties left un-dispossed at the time of his death. The allegation in paragraph 10 of the plaint that Meeralava Rawther intended to give the plaint schedule properties to the plaintiff was false and denied. He never had such an intention. His intention was to leave the properties for inheritance by all

his heirs. The plaintiff was a Government employee. Therefore, Meeralava Rawther gave some properties to his other children during his life time. The averment that the 1st defendant was residing on the north-western portion of the plaint schedule properties was denied. The 1st defendant was in possession of 40 cents of property and he was taking yield from that property from 1972 onwards. The averment that Meeralava Rawther gave consent to the 1st defendant with the permission of the plaintiff was denied. It was contended that the consent or permission of the plaintiff was not at all necessary. Apprehending eviction 1st defendant filed O.S.No.90/1992 before the Munsiff Court, Thodupuzha and in that case there was an order of injunction restraining the plaintiff or his men from trespassing into the 40 cents of property in the possession of the 1st defendant. The averment that there was a declaration by the father regarding the oral gift was denied. Other legal heirs of Meeralava Rawther did not attorn to the alleged gift . Possession of the property was not given to the plaintiff. The affairs of Meeralava Rawther were looked after by all his children. The averment that defendants 1 to 5 were induced by the 6th defendant to trespass upon the plaint schedule properties was denied. The alleged trespass was also denied.

5. Trial court raised the following issues:

1. Is the suit maintainable?

2. Whether the alleged oral gift of the plaint schedule property by Meeralava Rawther to the plaintiff is true?

3. Whether the declaration of title over the plaint schedule property prayed for is allowable?

4. Whether the injunction prayed for is allowable?

5. Whether the sale deed in favour of sixth defendant is liable to be set aside?

6. Whether the plaintiff is suffering from any mental infirmity and is incapable of protecting his interests?

7. Reliefs and costs.

**R.F.A.No.491/2006**

6. This appeal is filed by the 1st defendant in O.S.No.169/1994 which was a suit filed by the first respondent in this appeal. Plaintiff in O.S.No.169/1994 was the 3rd defendant in O.S.No.171/1992. The suit was for partition of the suit properties. The averments in the suit are as follows: Suit properties originally belonged to late Meeralava Rawther who died in the year 1986 leaving behind him the plaintiff and defendants 1 to 5 as his only legal heirs. Suit properties were obtained by Meeralava Rawther under partition deed No.4124/1953. Plaintiff and defendants 1 to 5 are muslims governed by hanafi law of inheritance. Plaintiff and 4th and 5th defendants are the daughters. Defendants 1 to 3 are the sons of deceased. Daughters inherited 1/9 share and sons inherited 2/9 share each.

Plaintiff and defendants 1 to 5 are co-owners and in joint possession of the suit properties. Defendants 1 and 2 are residing in the suit properties and they are taking yield from the properties for and on behalf of all the legal heirs of the deceased. 6th defendant purchased the share of 3rd defendant in the plaint schedule property as per sale deed No.657/1992 for valid consideration. Hence 6th defendant is also a co-owner of the plaint schedule properties along with the plaintiff and defendants 1 to 5. Plaintiff is entitled to partition and separate possession of her 1/9 share in the plaint schedule property and to realise her due share in profits. The annual mesne profits from the entire properties will come to Rs.4,500/-. She claims Rs.500/- towards her 1/9 share. Hence the suit for partition of 1/9 share of plaint schedule properties.

7. 1st defendant who was the plaintiff in O.S.No.171/1992 filed a written statement reiterating the averments he made in the plaint filed by him. It was contended that when Meeralava Rawther died in the year 1986 he had no properties of his own. The properties described in the plaint were given to the 1st defendant under an oral gift during January, 1982. This fact was known to the plaintiff and other defendants. They had attorned to the gift. 1st defendant accepted the gift in the year 1982and considered the property as his own property. 2nd defendant was given enough properties. In addition to that he was given 25 cents of property under document No.1163/1965. Likewise deceased Meeralava Rawther gave enough property or amounts which were equivalent to their share in

the properties to the plaintiff and other defendants and after receiving those benefits they had executed release deed Nos.1097/1991, 866/1971, 648/1981 and 1095/1971 in favour of their father. Some properties intended to be given to 4th defendant were given to the 2nd defendant as additional asset and, therefore, there was delay in giving properties to 4th defendant. Deceased Meeralava Rawther gave due shares from the family properties to all his children except 1st defendant and for that purpose deceased had sold his properties at Udumbanoor and also 25 cents from the plaint schedule properties. Meeralava Rawther had three acres and 21 cents and from that one acre and 26 cents was given to the mother of 6th defendant and 25 cents was sold to give the share due to the 4th defendant, the balance one acre and 70 cents was set apart to the share of 1st defendant. The averment that on the death of Meeralava Rawther plaintiff and other defendants inherited suit properties was denied. Properties given to the 2nd defendant were sold away by him and he had no house to stay then the father with the permission of the 1st defendant permitted the 2nd defendant to construct a building in the north-western corner of the properties and he constructed a building in 2 ½ cents of property and was residing there with his family. He had no right or possession over the rest of the properties. The 1st defendant was in absolute possession and enjoyment of the properties from January, 1982 onwards. The 1st defendant was taking yield as of right from the properties and he was not liable to account the same to anybody. Other children of Meeralava Rawther had accepted the

properties/amounts given to them in lieu of share in the family properties and executed release deeds in favour of Meeralava Rawther. None of them had asked for any share in the suit properties. Documents mentioned in paragraph 6 of the plaint were executed by the plaintiff and defendants 2 to 5 in collusion with the 6th defendant who was in inimical terms with the 1st defendant. The averments in paragraph 6 of the plaint itself show that the plaintiff and defendants 2 to 5 had colluded with the 6th defendant and the suit was filed on account of such collusion. Right claimed by the 6th defendant was denied.

8. 6th defendant filed a written statement admitting the entire averments in the plaint. Meeralava Rawther died intestate leaving plaintiff and defendants 1 to 5 to inherit his properties. Parties to the suit are governed by the hanafi law of inheritance. Plaintiff and defendants 4 and 5 are the daughters and defendants 1 to 3 are the sons of deceased Meeralava Rawther. Daughters of Meeralava Rawther inherited 1/9 share each and sons inherited 2/9 share each. On 7.3.1992 6th defendant purchased 2/9 share of the 3rd defendant under sale deed No.687/1992 for a consideration of Rs.15,000/- and after the date of purchase he is in joint possession with other co-owners. He issued a suit notice on 20.3.1992 claiming partition. On 6.5.1992 6th defendant purchased 1/9 share of 5th defendant as per sale deed No.1294/1992 for a consideration of Rs.8,000/-. Defendants 1 and 2 are residing in the suit properties. Consequent on the death of 2nd defendant his legal heirs and 1st defendant are taking income from the properties for and on

behalf of all the co-owners. 6th defendant is entitled to get 3/9 share in the plaint schedule properties.

9. The legal heirs of deceased 2nd defendant who are impleaded as additional defendants 7 to 13 in the suit filed a written statement admitting the averments in the plaint. It was contended that Meeralava Rawther died intestate in 1986 leaving the plaintiff and defendants 1 to 5 to inherit the plaint schedule properties. It was also contended that parties to the suit are muslims governed by hanafi law of inheritance and sons of deceased are entitled to get 2/9 share each and daughters 1/9 share each. 2nd defendant died on 2.7.1992. It was contended that in the year 1972 late Meeralava Rawther gave about 40 cents of land to the deceased 2nd defendant for his use and from that date onwards he was in possession of that plot and after his death additional defendants 7 to 13 are in possession of that plot. On 7.3.1992 6th defendant purchased 2/9 share of 3rd defendant and subsequently he purchased 1/9 share of 5th defendant for consideration. It was also contended that 1st defendant alone was responsible for the mesne profits and 2nd defendant was always willing and ready for partition of suit properties. Defendants 7 to 13 prayed that they may also be given their share separately.

10. The trial court raised the following issues:

1. Whether the plaintiff is entitled to get partition and separate possession of 1/9 share of the plaint schedule property?

2. Whether the oral gift of the plaint schedule property to the first defendant by Meeralava Rawther is true?

3. Whether the 6th defendant is entitled to separate 1/3 share in the suit property?

4. Whether the additional defendants 7 to 13 are entitled to to get 2/9 share in the plaint schedule property?

5. Regarding mesne profits and quantum thereof?

6. Reliefs and costs.

7. Whether the first defendant is suffering from any mental infirmity and is incapable of protecting his interests?

11. The two suits were consolidated and tried jointly. Evidence was recorded in O.S.No.171/1992. PWs 1 to 5 were examined on the side of plaintiff. Exts.A1 to A9 and C1 report proved and marked. DWs 1 to 3 were examined on the side of defendants. Exts.B1 to B4 proved and marked. Trial court held that the plaintiff in O.S.No.171/1992 failed to establish the oral gift pleaded by him. It was found that Exts.A2 to A6 executed by other children of deceased Meeralava Rawther are of no legal consequence and on the strength of Exts.A2 to A6 it cannot be held that defendants 1 to 5 will not inherit the property. So O.S.No.171/1992, filed by the plaintiff was dismissed. O.S.No.169/1994 filed by the 3rd defendant was decreed. A preliminary decree for partition of suit properties into nine equal shares and to allot 1/9 share to the plaintiff, 2/9 share to

defendants 7 to 13 and 3/9 share to the 6th defendant was passed.

12. Plaintiff in O.S.No.171/1992 has filed R.F.A.No.75/2004 challenging the decree and judgment in his suit of dismissal of the suit. R.F.A.No.491/2006 is filed by him challenging the preliminary decree for partition passed in O.S.No.169/1994. For the sake of convenience the parties will be referred to as arrayed in O.S.No.171/1992.

13. The following points arise for consideration in these appeals:

1. Whether the finding of the court below that the plaintiff in O.S.No.171/1992 failed to establish the oral gift alleged by him is correct?

2. Whether the plaintiff is entitled to get a declaration that he is the absolute owner of plaint A and B schedule properties?

3. Whether the 6th defendant had obtained 1/3 (3/9) share in the suit properties?

4. Whether the defendant Nos.3 and 7 to 13 are entitled to get shares in the suit properties?

5. Whether the appellant/plaintiff is liable to pay the share of profits to the respondents/defendants?

6. Whether the findings of the court below that plaintiff was suffering from any mental infirmity and incapable of protecting his interests are correct?

**POINT No.6.**

14. The appellant in these appeals is represented by his next friend and

son. Initially the appellant was prosecuting the suits as his own. When the suits came up for trial he did not appear and contest. Suit filed by the plaintiff was dismissed and the suit filed by the 3rd defendant was decreed. Plaintiff filed a petition under Order IX Rule 9 of the Civil Procedure Code in O.S.No.171/1992 and a petition under Order IX Rule 13 of the Civil Procedure Code in O.S.No.169/1994. Both the petitions were dismissed. Plaintiff filed Civil Miscellaneous Appeals before this Court and a Division Bench of this Court to which I was also a party allowed the Civil Miscellaneous Appeals, set aside the order of dismissal for default and the exparte decree and remanded the case for fresh disposal. In the Civil Miscellaneous Appeals also the plaintiff was represented by his son as next friend.

15. When the suits were posted for trial the plaintiff filed petitions seeking permission to allow his son to act as his next friend. Third defendant who was the plaintiff in O.S.No.169/1994 filed an affidavit stating that in case the plaintiff comes to the court he will not be able to give false evidence and that is the reason why he want his son who is a famous lawyer of this Court to give evidence as his next friend. A senior lawyer along with a Doctor were appointed as commissioners. They filed Ext.C1 report. Doctor after examining the plaintiff found that he was suffering from organic brain syndrome and other diseases and he was undergoing treatment from the year 1990 onwards. The trial court rejecting the objections raised by the 3rd defendant and permitted his son to

give evidence. I have carefully gone through Ext.C1 report, medical certificate issued by the Doctor and also the oral evidence tendered by the son of the plaintiff as PW1. After going through the evidence tendered by PW1 and also the medical evidence I fully agree with the view taken by the court below that the plaintiff was not using his son so as to take any undue advantage. The finding of the court below that the plaintiff was suffering from mental infirmity and was incapable of protecting his interests is correct and does not call for any interference. That finding is only to be confirmed. I do so.

**POINT No.1.**

16. Now I shall consider how far the finding of the trial court that the plaintiff failed to establish the oral gift pleaded by him in the plaint. The case of the plaintiff was that Meeralava Rawther orally gifted the plaint schedule properties to the plaintiff in January, 1982 and he was in exclusive possession and enjoyment of the same. Meeralava Rawther had six children - three sons and three daughters. All of them except the plaintiff were married prior to 1971. It was also his case that all other children of Meeralava Rawther were given properties and money equivalent to the share which they might have obtained at the time of death of Meeralava Rawther and obtained Exts.A2 to A6 documents All of them had agreed that they will not make any claim for other properties in future.

17. Meeralava Rawther got the properties under Ext.A1 partition deed.

He died in the year 1986. According to the plaintiff the oral gift was in January, 1982. Of course a Mohammedan can orally gift his properties. The three essential conditions of gift by Muslim are - (1) a declaration of gift by the donor, (2) an acceptance of the gift express or implied by or on behalf of the donee and (3) delivery of possession of the subject of the gift by the donor to the donee. The specific case put forward by the appellant/plaintiff was that all the other children of Meeralava Rawther attoned and accepted the gift. 4th defendant did not appear and contest. Defendants 2 and 5 executed sale deeds in favour of 6th defendant asserting their right over suit properties. 1st defendant died and his heirs filed written statement denying the gift. 3rd defendant also denied the gift and filed a suit for partition. So the other children of Meeralava Rawther are not admitting the oral gift. Even prior to the death of Meeralava Rawther the plaintiff was residing along with him in the suit property. So the possession alone is not sufficient to prove the gift. Plaintiff examined PWs 3 and 4 to prove the oral gift. Trial court rejected their evidence. PW3 is stated to be a neighbour. His evidence shows that he had no direct knowledge about the oral gift. PW4 was working as housemaid in the house of Meeralava Rawther. Her evidence was also not accepted by the trial court. The wife of the plaintiff was examined as PW2. She deposed that there was an oral gift in favour of plaintiff. The court below did not accept her evidence also. There is no averment regarding the date of execution of gift in the plaint but at the time of oral evidence PWs 1 and 2 deposed that the oral

gift was made on a particular day. There was no pleading to the effect that who were all present when the alleged oral gift was executed. Trial court found that the details of oral gift was lacking and the plaintiff failed to plead and prove the oral gift. That is a finding of fact based on good evidence. I do not find any reason to interfere with that finding of fact. So that finding is confirmed.

**POINT Nos.2 to 5.**

18. Now I shall consider whether the plaintiff is able to prove his title over the suit properties. The learned counsel appearing for the appellant/plaintiff has argued that the court below misconstrued the pleadings and evidence in this case. It is argued that the title by the plaintiff was not based on the oral gift alone. The specific case put forward by the plaintiff was that Meeralava Rawther had given sufficient properties equivalent to the legitimate share each of the children may get from the family properties except the plaintiff and got release deeds executed by them. They had agreed that they will not make any claim in the future over remaining properties. It is argued that it was a family arrangement. Meeralava Rawther was under the belief that since all other children were given due shares whatever property remain undivided will vest with the appellant and hence he did not execute a registered document conveying the title to the plaintiff. It is also argued that conduct of Meeralava Rawther shows that he was meticulous and only because of the fact that all other children were given their due share he did not execute a deed of conveyance. It is argued that in view of Exts.A2 to A6

the plaintiff will get absolute title over the suit properties and even if if is found that the plaintiff failed to prove the oral gift he cannot be non-suited as he alone was having right over the assets of Meeralava Rawther at the time of death of Meeralava Rawther. It is further argued that to establish that fact the plaintiff examined PWs 1, 2 and 5 and also produced Exts.A2 to A6 documents. It is argued that the trial court did not consider the pleadings on that point and the evidence tendered by PWs 1 to 3 and rejected Exts.A2 to A6 on the ground that such documents are void in view of the provisions contained under Section 6 of the Transfer of Properties Act. It is also argued that in view of the provisions contained under Section 2 of the Transfer of Properties Act the provisions contained under Section 6 of the Act can have no application in the case of a Mohammedan gift and though Section 54 of the Mohammedan Law provides that the chance of a Mohammedan heir apparent succeeding to an estate cannot be the subject of a valid transfer or release, that does not prevent a man from executing a release deed on account of the family settlement. It is argued that the suit for partition was filed at the instigation of the 6th defendant who had an axe to grind against the plaintiff. It is argued that 6th defendant is the son of a half sister of Meeralava Rawther. There was dispute between Meeralava Rawther and this sister regarding partition of properties and 6th defendant was in inimical terms towards Meeralava Rawther and his children. It is also argued that taking into account the fact that there was no written document he instigated the 2nd defendant

to execute sale deed. The sale deed was executed on 7.3.1992 and a suit notice was issued on 20.3.1992. But he did not file any suit. On the strength of that document he tried to trespass on the properties. On 31.3.1992 the plaintiff filed O.S.No.171/1992. It is argued that the the 6th defendant influenced the 3rd defendant to file a suit for partition and thereafter took a sale deed from 5th defendant on 6.5.1992.

19. The materials on record show that Meeralava Rawther had obtained the suit properties from his family. There was dispute between Meeralava Rawther and his half sister who was the mother of 6th defendant. The mother of 6th defendant filed a suit. On 8.9.1953 one acre and 70 cents of property was allotted to the share of Meeralava Rawther. He had properties at other places also. Deceased 1st defendant was the eldest son of Meeralava Rawther and he married in the year 1960. He was given one acre of property. In the year 1965 another 25 cents of property was also given to him. According to the plaintiff those properties were given to 1st defendant as legitimate share he would have got had there been a partition of family properties. The 1st defendant executed Ext.A2 release deed in which he had admitted that he will not make any further claim over other assets of Meeralava Rawther as he had received his share. In paragraph 4 of the plaint it was averred that in the year 1971 the 2nd defendant was also given whatever share he was entitled to and using that money he purchased property at Neyyasseri and started residence there. After receiving the share he had

executed document No.866/1971 by which he had relinquished his rights over the remaining properties. In paragraph 5 it was averred that the 3rd defendant who was the plaintiff in O.S.No.169/1994 was given away in marriage and in the year 1971 Meeralava Rawther gave whatever share due to her and after receiving such shares she had executed document No.1097/1971 releasing her right over the remaining properties. 4th defendant was given away in marriage and was residing at Keerikode. She had executed document No.648/1981 relinquishing all her rights over the remaining properties. Meeralava Rawther sold 25 cents of property to one Raman to give shares due to 4th defendant. 5th defendant is the eldest daughter of Meeralava Rawther. She was given away in marriage about 45 years prior to the date of filing of the suit. She was also given her due shares in the year 1971 and after receiving the same she also executed release deed No.1095/1971 in favour of Meeralava Rawther. In paragraph 8 of the plaint it was reiterated that Meeralava Rawther had given sufficient properties to all his children except the plaintiff at the time of their marriage and the transactions referred to in paragraphs 5 to 7 were in addition to those benefits. Plaintiff got married in the year 1971 and from 1971 onwards plaintiff and parents alone were residing in the family house situated in plaint A and B schedule properties. It was specifically averred that Meeralava Rawther got release deeds from his other children with the sole idea of giving the suit properties to the plaintiff alone and for paying necessary amounts to defendants 2, 3 and 5 Meeralava Rawther had

sold away properties he was having at Udumbanoor and another 25 cents. In paragraph 4 of the written statement filed by the 3rd defendant it was contended that the allegations in paragraphs 3 to 10 of the plaint were not true and correct and hence denied. There is no specific denial of the averments that the properties were given to the 3rd defendant in lieu of her shares in the family properties and she had executed Ext.A4 release deed after receiving her due share from her father. According to the contesting defendants they had no right over the properties of the deceased during his life time and hence Exts.A2 to A6 were of no use or legal effect. It was further contended that the properties given to them during his life time became their absolute properties by virtue of the transfer of properties in their favour and those transfers did not disqualify them from inheriting the properties of Meeralava Rawther after his death. In paragraph 3 of the written statement it was contended that Meeralava Rawther died intestate and 6th defendant purchased the shares due to defendants 2 and 5. A reading of the written statement filed by the 3rd defendant would show that she was more interested in protecting the interest of the 6th defendant. 6th defendant filed a written statement raising the identical contentions raised by the 3rd defendant. The 6th defendant also did not specifically deny the averment that properties were given to defendants as family arrangement. There was only vague denial. It was contended that the allegations in paragraphs 3 to 10 are not correct and hence denied. 6th defendant contended that during the life time of Meeralava Rawther

none of his children had any right over his properties and he was the absolute owner. The alleged release deeds had no legal effect or legal consequences. It was averred that if anything was given to defendants 1 to 5 by their father during his life time that will not disqualify them from inheriting the properties. Deceased was the absolute owner in possession of the suit properties till his death. 6th defendant contended that he had purchased the right of defendants 2 and 5. Defendants 7 to 13 who are the legal heirs of 1st defendant also filed a written statement raising a contention that the averments in paragraphs 3 to 10 are false and incorrect. They had also contended that during the life time of Meeralava Rawther none of his children had any share or interest in the properties and the release deeds executed by defendants 1 to 5 had no legal effect or legal consequences.

20. Though the plaintiff had raised specific plea that Exts.A2 to A6 were executed as family arrangement there was only an evasive denial of those averments. As I have already stated the plaintiff could not be examined. His son gave evidence as PW1. During chief examination he deposed that 1st defendant was given one acre of property as share of his family properties and in addition to that he was given another 25 cents in the year 1965. He further deposed that 1st defendant sold away all the properties and shifted his residence to Vannappuram and later he came back. He was permitted to construct a building in the north-western corner of the suit properties and was residing there. Regarding the 2nd

defendant also PW1 deposed that in the year 1971 Meeralava Rawther gave amounts equivalent to the share which he should have obtained from the family properties and on receipt of such share 2nd defendant had executed Ext.A3 release deed by which he relinquished his right over the share which he would have got from other properties. He deposed that the 3rd defendant received her legitimate share and executed Ext.A4 release deed. He further deposed that defendants 4 and 5 also received cash in lieu of their shares and executed Exts.A5 and A6 release deeds. Thereafter he deposed that defendants 3 to 5 were given properties at the time of marriage in addition to the properties stated in Exts.A2 to A6. He deposed that Meeralava Rawther had given shares due to all his children except the plaintiff. He further deposed that Meeralava Rawther gave properties which were equivalent to the shares due to them and obtained Exts.A2 to A6 release deeds with the sole intention of giving plaint A and B schedule properties to the plaintiff. He had deposed that for giving the shares due to defendants 2, 3 and 5 Meeralava Rawther had sold his properties at Udumbannoor and 25 cents from the portion which was intended to be given to the plaintiff. He further deposed that the 6th defendant is the son of his grandfather's sister Khadeeja and and there was a dispute between Khadeeja and his grandfather. According to PW1 because of that dispute 6th defendant was in inimical towards the family of plaintiff and instigated the other children of Meeralava Rawther to claim right over plaint schedule properties. He further

deposed that defendants 1 to 5 had claimed shares at the instigation of 6th defendant He was cross-examined at length. He was asked if Meeralava Rawther had an intention to give A and B schedule properties to the plaintiff alone why he did not execute a document to that effect. His reply was as follows: "As an old man he did not think in such a way and his intention was very clear from the documents. Further there was no dispute." PW1 was not cross-examined with reference to his evidence that Exts.A2 to A6 were executed as family settlement. PW2 is the mother of PW1 and the wife of the plaintiff. She also gave evidence to the effect that her father-in-law told her that he had given due shares to all other children except the plaintiff and therefore, the suit properties are set apart to her husband who is the youngest son. She further deposed that at the time of their marriage no share was given to the eldest daughter but subsequently she was also given her due share. She deposed that Amina was given 25 cents of property. She further deposed that properties equivalent to due shares were given to all other children of Meeralava Rawther except her husband and they had executed release deeds. She also deposed that release deeds were obtained after giving due shares to other children with the sole intention to give the suit properties to her husband alone. She deposed that to give the share due to defendants 2, 3 and 5 her father-in-law had sold his properties at Udumbannoor and another 25 cents. She was also cross-examined at length. Of course during cross-examination by 6th defendant she had admitted that while executing

Exts.A2 to A6 she was not consulted and she does not have any direct knowledge regarding the execution of those documents. She further deposed that the daughters of Meeralava Rawther told her that they were given Rs.1,000/- and 16 sovereigns each at the time of their marriage. Her evidence to the effect that the other children of Meeralava Rawther were given properties in lieu of their shares over the family properties was not challenged by anyone of the defendants during cross examination. PW5 is a close relative of Meeralava Rawther. He is the son of Meeralava Rawther's brother. He also deposed that the properties were owned by Meeralava Rawther and his wife and the properties at Udumbannoor and other places were sold to give shares due to other children except the plaintiff. He further deposed that Meeralava Rawther obtained release deeds from all other children except the plaintiff. During cross-examination he had deposed that it was Meeralava Rawther who told him that he (Meeralava Rawther) had obtained release deeds from his children. During cross-examination he had deposed that there was no need to execute a document when other children were given their due shares and in such case the the rest of the property will be given to the youngest son by way of gift. The relevant portion reads as follows:

Relationship of PW5 with Meeralava Rawther was not disputed. Defendants had

no case that PW5 had any axe to grind against any one of them. The evidence given by PW5 about the family arrangement was also not challenged.

21. 3rd defendant who was the plaintiff in O.S.No.169/1994 was examined as DW1. In chief-examination she deposed that she was entitled to get a share of properties of Meeralava Rawther and she had not executed any document in favour of Meeralava Rawther. During cross-examination she deposed that the document executed by her is without any legal effect and during the life time of her father she had no right over the properties and she got right only after the death of her father. She further deposed that that document will not take away her right to get share from the estate left by the deceased. She had no case that the recital contained in Ext.A4 that she was given her due share was not true. Her stand was that that document will not take away her right to claim partition over the remaining properties. She had admitted that in addition to the suit properties Meeralava Rawther had properties at Kaithakottu in Thodupuzha and one acre property at Udumbannoor. She had also admitted that those properties were given to 1st defendant. She deposed that her mother also had properties. When a suggestion was put to her that father sold the properties in the year 1980 to give the due shares to defendants she deposed that she does not know the reason. Regarding Ext.A4 she deposed that her father approached her with a paper and asked her to sign and therefore, she affixed her signature. She deposed that she was under the impression that that was in respect of her mother's

property. She further deposed that she was not bound by that agreement and she must get share from her father's property. She had deposed that she had affixed signature in Ext.A4 on the assumption that the properties covered by the document were her mother's property. She had also admitted that though the father died in the year 1986, the suit was filed in the year 1992. Her explanation for the delay that she could not file the suit. 6th defendant was examined as DW2. According to him he had purchased the rights of defendants 3 and 5. The only evidence given by DW2 in respect of Exts.A2 to A6 was that those documents will not take away the right of the children to inherit their father's property. He also had no case that the defendants were not given their shares in the family property. He had admitted that 2nd defendant was residing at Neyyasseri which was far away from the suit properties and the 5th defendant was also residing about 20 kms away from Thodupuzha. According to him it was the 1st defendant who asked him to purchase the properties of 5th defendant. He had admitted that there was dispute between the plaintiff's father and his mother. It is true that he denied the suggestion that he took the two sale deeds on an understanding that he will pay the amounts stated in the sale deeds only if he gets share of the suit properties. He had admitted that Advocate Shri P.V.George appearing for him is junior of the Advocate who filed the suit for partition for the 3rd defendant. There is absolutely nothing in the evidence of DW2 to negative the evidence given by PWs 1, 2 and 5 regarding the family arrangement. 12th defendant was examined as DW3. In the

chief-examination he had not stated anything about Ext.A2 document executed by his father. During cross-examination when he was asked about the properties given to his father, he deposed that he does not know anything. When a question regarding one acre of property near Kaithakottu Mosque was put to him he deposed that that was a transaction which took place long back. When a specific question was put to him to the effect that his father (1st defendant) was given due share he deposed as follows:

22. Now I shall consider the documents relied on by the plaintiff. Ext.A2 was styled as a partition deed. It was executed by Meeralava Rawther and his wife. In that document it was stated that 1st defendant had made a demand that he should be given his due share and that request was considered by the executants and they were also on the same view. Hence that document was executed. In Ext.A2 it is stated that he made a demand that he should be given due share from the family property and the parents were also the view that he should be given due shares. It was stated that after the execution of the document he will have no right over any other property which was owned by the executants

and he will have no right to make any demand. The relevant portion reads as follows:

So the document clearly establishes that though the 1st defendant had no pre-existing right, his parents jointly executed Ext.A2 document in the form of a partition deed and he was given the properties on a specific undertaking that that was the share due to him and thereafter he will not get any right over the remaining properties. Trial court rejected that document on a ground that it was not accepted by the donee. Ext.A2 was presented for registration by the 1st defendant himself and subsequently he got the document back from the Sub Registry. That fact alone is sufficient to hold that deceased 1st defendant accepted that document. Ext.A3 is a document executed by the 2nd defendant. It was recited that for his future maintenance he made a demand for Rs.200/- towards his share and that proposal was accepted by Meeralava Rawther and for that consideration he had relinquished all his right over the property scheduled in the plaint. That document was presented for registration by the 2nd defendant. Ext.4 is a document executed by the 3rd defendant. It also contains the similar recitals as

in Ext.A3. It was stated that 3rd defendant made a demand that she should be given Rs.200/- towards her share and that was accepted and after receiving that consideration she had executed the document. That document was executed by the 3rd defendant and she presented the same for registration. Ext.A5 was executed by the 4th defendant Amina, wherein it was stated that she was residing with her husband and she is to be given Rs.500/- as her due share and she had received the same and she will not make any claim in respect of the properties of Meeralava Rawther. That document was presented for registration by the 4th defendant herself. She appeared before the Sub Registrar and admitted the execution of the document. Ext.A6 is a similar document executed by the 5th defendant. It also shows that she made a claim for Rs.200/- which was given by her father and on receipt of that consideration she had undertaken not to make any further claim in respect of the properties. That document was presented for registration by the 5th defendant.

23. The trial court proceeded on a wrong assumption that these documents are hit by Section 6(1) of the Transfer of Properties Act. Trial Court failed to note that in view of the provisions contained in Section 2 of the Transfer of Properties Act the provisions of Section 6 are not applicable to Muslims. In the Principles of Mahomedan Law written by Shri M.Hidayatullah at page 45 he has noted that Allahabad and Travancore-Cochin High Courts had taken a view that a Mahomedan heir may by his conduct be estopped from claiming inheritance if the

release was part of a compromise or family settlement and if he has benefited by the transaction. In this connection evidence regarding this point is also very pertinent. The contesting defendants in the written statement had taken a contention that merely because they were given some properties that will not take away their right to claim. They have no case that they were not given any properties and they were misrepresented and got Exts.A2 to A6 executed. The plea of the defendants was that the plaintiff was a Government servant and other children of Meeralava Rawther were not employed. So Meeralava Rawther wanted to give something in addition to the share due to them and that was the reason why they were given some amounts/properties. Learned Sub Judge did not consider the effect of recital in Exts.A2 to A6.

24. It was contended that the amounts mentioned Exts.A3 to A5 are very meagre. It is very pertinent to note that neither in the pleadings nor at the time of evidence defendants had raised such a contention. The evidence on record shows that defendants 1 to 5 were given amounts as consideration for executing Exts.A2 to A6. There is evidence to show that in addition to the consideration stated in the documents they were given other properties also. The defendants had no case that they were not given any other properties other than the consideration stated in those documents also. Defendants never raised a contention that the amounts given as consideration are meagre. In this connection it is to be noted that 6th defendant purchased the properties in the year 1992 as per Exts.B1 and B2. As

per Ext.B1 dated 7.3.1992 for the 2/9 share of 2nd defendant he gave only Rs.15,000/-. Ext.B2 is dated 6.5.1992. For the 1/9 share of 5th defendant he gave only Rs.8,000/-. Exts.A2 to A6 were executed 21 years prior to Exts.B1 and B2. The learned Sub Judge had not stated any reason for arriving at a conclusion that the consideration mentioned in Exts.A2 to A6 are meagre. There is absolutely no pleading or proof in support of that finding. On the other hand the specific case put forward by them was that the documents are void. The materials on record clearly show that Meeralava Rawther gave properties to defendants 1 to 5 at the time of their marriage and subsequently also as a family arrangement. So the question to be considered is whether a Mohammedan can validly relinquish a right he may got in the future as a family arrangement.

25. In **Latafat Husain v. Hidayat Husain (AIR 1936 Allahabad 573)** the Allahabad High Court held as follows:

> "There is nothing illegal in a person, for good consideration, contracting not to claim the estate, in the event of his becoming entitled to inherit on the decease of a living person; and the provisions of S.6, T.P.Act, do not in any way create a bar against the legality of such a contract. S.6 cannot in terms apply to such a relinquishment".

In **Kochunni Kochu v. Kunju Pillai (1956 Trav-Co 217)** it was held as follows:

> "The deed of relinquishment being a part of valid family settlement and being supported by consideration had to be given effect to and therefore the plaintiff could not claim partition of the estate left by M".

In **Gulam Abbas v. Haji Kayyam Ali (AIR 1973 SC 554)** the Apex Court held as follows:

> "The binding force in future of such a renunciation depends upon the attendant circumstances and the whole course of conduct of which it forms a part. It the expectant heir receives consideration and so conducts himself as to mislead an owner into not making dispositions of his property inter vivos the expectant heir can be debarred from setting up his right when it does unquestionably vest in him".

In **Thayyullathil Kunhikannan v. Thayyullathil Kalliani (AIR 1990 Kerala 226)** this Court held as follows:

> "When there is a family arrangement binding on the parties, it would operate as an estoppel by preventing the parties, after having taken advantage under the arrangement, from resiling from the same, or trying to revoke it. Recitals in the document incorporating the family arrangement are also equally binding".

In **Pathuma Kunju v. Assya (ILR 1978(2) 529 (Ker.))** this Court held as follows:

> "If the daughter accepts this gift certainly she cannot claim any right in the estate after the death of her father".

In **Damodaran Kavirajan v. T.D.Rajappan (AIR 1992 Kerala 397)** this Court held as follows:

> "Gift deed executed in favour of heir to settle family dispute on condition that donee shall forgo his right of inheritance - Though termed as gift deed it is a family arrangement".

In **Sarojini Amma v. Johnson (2000 (1) KLT 603)** this Court held as follows:

> "This is not a mere desire of the donor, but really it has an effect of agreement and consent that they cannot ask for any share in the property. It is based on that condition and consenting to that condition that they had accepted the gift. Now, they cannot turn round. A person may not take a benefit and reject an associated burden or to put it in another way, a person may not choose between parts of a single transaction. He may not approbate and reprobate. Thus this is a case of estoppel on the part of the plaintiff on the basis of which the defendants had acted, obtaining sale of the remaining properties from the rest of the heirs of the mother of the plaintiff. S.43 of the Transfer of Property Act also contains a principle of estoppel as in the case of S.115 of the Evidence Act".

In **Hameed v. Jameela (2004(1) KLT 586)** this Court held as follows:

> "Acceptance of share during the life time of father from the father estops a prospective legal representative to claim a share in his or her parental property after the father's death".

26. The learned counsel appearing for the respondents argued that the above principle cannot be made applicable to Muslims because the principle is that from what is left by the parents and those nearest related there is a share for men and a share for women. It is argued that the property be small or large there will be a share. The learned counsel brought my attention to the words in Quran in support of his argument. It is argued that in Gulam Abbas case (supra) the Apex Court held that mere execution of a document is not sufficient. It must be shown that the donor conducted himself as to mislead an owner into not making

dispositions of his property inter vivos then only the heir appellant can be debarred. In this case evidence of PWs 2 and 5 shows that Meeralava Rawther was under the impression that since he had given due shares to other children the plaintiff who was the youngest son will get the remaining properties and hence there was no need to execute any document. That part of the evidence is not challenged. There is evidence to show that Meeralava Rawther did not execute any document because of Exts.A2 to A6. So the principle laid down in Gulam Abbas case (supra) squarely applies to the facts of this case.

27. Meeralava Rawther died in the year 1986. 6th defendant got the sale deed from the 2nd defendant on 7.3.1992 and within two weeks thereafter he issued the suit notice. But he did not file any suit. The averments in the plaint filed by the 3rd defendant as well as the written statements filed the contesting defendants show that they were more interested in protecting the interest of the 6th defendant. As already stated the 6th defendant was represented by the junior lawyer of the lawyer who appeared for 3rd defendant. The contentions raised by them were identical. So there is much force in the argument advanced by the appellant that it was the 6th defendant who instigated the other children of Meeralava Rawther to file the suit. Defendants 2 and 5 who purported to sell their right to 6th defendant are residing far away from the suit properties. The irresistible conclusion possible from the proved facts in this case is that Meeralava Rawther and his wife had properties and properties were given to defendants 1 to 5 in lieu of their

shares as a family arrangement and as part of the family arrangement defendants 1 to 5 executed Exts.A2 to A6 by which they relinquished their claim over the suit properties. Exts.A2 to A6 are valid documents. The evidence on record clearly shows that defendants 1 to 5 had got their shares from the family properties and executed Exts.A2 to A6 in the form of family settlement. Hence they cannot be allowed to turn round and argue that they are also entitled to get share in the suit properties. I hold that after execution of Exts.A2 to A6 documents defendants 1 to 5 had no right over the suit properties and plaintiff alone is entitled to get the same. So the finding of the court below in O.S.No.169/1994 that plaintiff and defendants6 and 7 to 13 are entitled to share is liable to be set aside. That suit is liable to be dismissed. I do so.

28. Now I shall consider the relief the appellant/plaintiff in O.S.No.171/1992 can be given. It is admitted by the plaintiff that the heirs of 1st defendant are residing in B schedule properties. Pleadings and evidences show that Meeralava Rawther gave sufficient properties to 1st defendant but he sold away everything and at that time Meeralava Rawther permitted him to construct a house at the north-western corner of the property. He was residing there along with his family members. After his death his widow and children are residing there. Plaintiff had admitted that though his father wanted to give the entire suit properties to him his father sold 25 cents subsequently. It is pertinent to note that according to the plaintiff 1st defendant was having possession only over the 2

½ cents which was described as B schedule. So the plaintiff is not entitled to get any relief in respect of B schedule properties. He is entitled to get a declaration and right over A schedule properties. So the judgment and decree passed in O.S.No.171/1992 are liable to be set aside and the suit is decreed so far as it relates to A schedule.

In the result, both the appeals are disposed of in the following manner. R.F.A.No.75/2004 is allowed in part. The judgment and decree passed by the trial court dismissing O.S.No.171/1992 are hereby set aside. Suit is decreed in part in respect of A schedule properties alone. It is declared that the appellant plaintiff is the absolute owner of A schedule properties and he is in possession of the same. The relief sought for in respect of B schedule properties is rejected. R.F.A.No.491/2006 is allowed. The preliminary decree and judgment passed in O.S.No.169/1994 allowing partition of suit properties are hereby set aside. That suit is dismissed. Parties are directed to suffer their respective costs.

I.A.No.387/2004 in R.F.A.No.75/2004 and I.A.Nos.322/2004 & 3943/2006 in R.F.A.No.491/2006 will stand dismissed.

**K. PADMANABHAN NAIR,**
**JUDGE.**

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